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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

NO. 801

NEIL A. WOODINGTON

Appellant-Petitioner

v.

STATE OF WISCONSIN

Appellee-Respondent

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL AND IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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ARGUMENT

To make it easier to compare the arguments of the Appellee with those presented in this reply brief, the outline used by the Appellee in support of its motion to dismiss and in opposition to the petition for certiorari has been followed.

ARGUMENT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

I. The Unconstitutionality of the Wisconsin Statute Presents a Substantial Federal Question.

Appellant's brief, contended that the negligence clause of Section 189.19 (2) (d) was void for vagueness. Appellant attempted to cite examples of additional phrases which might be inserted in the statute to help clarify the category of proscribed behavior and to help make the standard of liability more certain. The additional language suggested was to meet the argument that the statute was "as definite and certain as the subject matter would permit." However, no matter how many additional phrases are added, the cases cited in the jurisdictional statement point out that whenever negligence or reasonable care are used as a standard of liability in a criminal statute regulating economic activities, the United States Supreme Court will probably find the statute void for vagueness.

Appellee states that the Appellant concedes the constitutionality of the statute, because the trial court, through its instructions, corrected the deficiency in the statute. In making this assertion, Appellee takes but one of the changes suggested by Appellant. Even if Appellant were to admit Appellee's arguments with reference to the standard of liability - which we do not - Appellee has failed to deal with the other suggested change required to clarify the category

of proscribed behavior. Appellant's proposed amendments were merely suggestions as to how that statute could be improved. It is not appellant's obligation to rewrite the statute, and any rewriting should, as previously pointed out, drop the standard of reasonable care.

In this connection it is interesting to note the criminal penalties section of the Federal Securities Act:

> "Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof or any person who willfully in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis supplied) 15 U.S.C. §77x Penalties.

No attempt was made by Congress in the Securities Act to assess criminal liability for negligence on the part of any corporate executive. A reading of the void for vagueness cases cited in Appellant's brief, plus the generally accepted requirement of criminal law that a person ought not to be labeled criminal unless morally blameworthy, adequately explains the omission of negligence or reasonable care as a standard of liability in this statute.

These criminal sanctions in §77x should be contrasted with remedies under §77k of the Securities Act which deals with civil liability and uses the standard of reasonableness.

It is also interesting to note the considerable protection a corporate executive has under the Federal Securities Law if he relies on the opinion of an expert, such as a certified public accountant. See §77h of the Securities Act. The preliminary hearing in this case, which was made a part of the pretrial motions to dismiss, which are a part of the record on appeal, clearly indicated (1) that the financial statement on which Appellant was convicted was prepared by external certified public accountants, (2) that these accountants were not misled by activities of the Appellant and (3) that Appellant did not prepare the financial statements, nor direct or control the manner in which they were presented. Appellant's jurisdictional statement on page 19 points up that the common fault of many of the statutes found to be void for vagueness by this Court is that the statute injects in the "governmental wheel" so much free play that in the practical force of its operation it is likely to function erratically and to result in a significant number of impermissible, public versus private - interest, resolutions which are beyond the effective discovery or appraisal of this Court. The fact that a prosecutor charged Appellant, and a jury found him guilty of filing a false or misleading financial statement in spite of the preparation of this certified statement by external certified public accountants, is good evidence of precisely the whimsical free play of the "governmental wheel"

which is criticized in the void for vagueness cases.

Appellee in its brief in support of motion to dismiss fails to recognize the distinction carefully drawn in Cline v. Frink Dairy Co., 274 U.S. 445 (1927) between (1) and issue like negligence--" a rule of conduct for the average man in the avoidance of injury to his neighbors"-- and (2) an economic issue involving reasonableness or reasonable care--one involving judgment and action in respect to what is a reasonable price or profit or what is reasonable accuracy in a financial statement. The United States Supreme Court has frequently invoked the void for vagueness doctrine in cases involving statutes regulating economic activities, statutes much like the statute involved in this case. Appellee on page 12 of its brief actually quotes a portion of the Cline case recognizing the distinction. Appellant's jurisdictional statement at page 18 quotes other language from the Cline case recognizing the distinction. In an article titled The Use of Indefinite Terms in Statutes, Freund, 30 Yale L. J. 437 (1921) the author says such terms as reasonable, proper, sufficient, suitable and necessary represent the lowest grade of certainty when used in statutes. They involve either an appeal to judgment or a question of degree. They provide a flexibility which, "(p)resumptively (is) more appropriate to civil than to criminal legislation." (p. 438) It is not sufficient to state as Appellee does on page 11 of his brief in support of motion that because the standard of reasonable care has a meaningful referent in the common law

that the Cohen Grocery case has no applicability here. The term "reasonable" also has a well-defined meaning in the common law, but this Court has found it too uncertain when used in certain criminal statutes involving economic regulations. Perhaps Appellee's arguments to the effect that the standard of reasonable care is a sufficiently precise standard might apply if we were dealing with civil rather than criminal liability. Writers on the subject are quite uniform, however, in stating that the standard of reasonable care is not a proper standard of liability in a statute imposing substantial criminal penalties. As one author noted, the concept that terms with a common law meaning are sufficiently definite in criminal statutes is an old saw, a dogma of void for vagueness lore; his comments indicate it is not to be considered seriously today. Void for Vagueness Doctrine, 109 U. of Penn. L. Rev. 67 (1960) at p. 88, fn 103.

In the Void for Vagueness Doctrine, supra, at pages 74 and 75, the author points out that "vagueness alone, although helpful and important, does not provide a full and rational explanation of the case development in which it appears so prominently... in the great majority of instances the concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures."

The article then goes on to discuss the conditions under which the vehicle of vagueness will be utilized. It concludes that the

"vagueness doctrine is chiefly an instrument of buffer zone protection". p. 85. It "has been used...almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." p. 75. "And, where conviction is under state statute...(a lawyer) may perhaps succeed in invoking the invalidating rule of Lanzetta--provided that his client's conduct is not particularly evil as viewed by the prevailing moral temper of the Court, that the ambiguity he urges is not seen by the Court as a mere pretext for evasion, and that other, clearer legislative methods of achieving the end sought by the contested statute appear to the Court possible and equally practicable." (parenthetical material supplied) pp. 86, 87. Appellant's jurisdictional statement discusses these other methods on pages 26-28.

In one of the footnotes to the above quotation the author notes, "It seems significant that the void for vagueness doctrine has been successfully invoked before the Court only by convicted or putative offenders against the economic regulatory laws--white collar crimes, not malum in se-- or against various crimes of speech..." The author then cites other possible explanations of the correlation and says: "But beyond these explanations there seems to have been a persisting tendency of the Court to look to ethical overtones in vagueness situations. See Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Miller v. Strahl, 239 U.S. 426 (1915);" and others. p. 87. "This same conception is instinct in the theme of 'scienter'

or mens rea which runs through the vagueness cause... Yet it is evident that unless the Court has been fooling itself in these cases, the 'scienter' meant must be some other kind of 'scienter' than that traditionally known to the common law...a clarificatory 'scienter' must envisage not only a knowing what is done but a knowing that what is done is unlawful, or, at least, so 'wrong' that it is probably unlawful." fn 98 p. 87.

"The language which no decision can definitely clarify and which consequently has been the virtually exclusive target of void-for-vagueness nullification is that which falls within Professor Freund's third category: terms of judgment and degree. Here are Cohen's 'unreasonable' charges, Cline's 'unreasonable' profits,... Herndon's 'reasonable' time... These are phrases of inherent discontrol. Not all such statutes have been voided, of course. Many legal responsibilities may be made to turn---as many common-law duties have traditionally turned---upon the 'reasonableness' of conduct as viewed by some trier of fact. But it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck ad hoc on the basis of a subjective evaluation... that there exists the risk of continuing irregularity with which the vagueness cases have been concerned." pp. 92, 93.

"To say that the void for vagueness rule is applicable to noncriminal proceedings,

> however, is not to say that the seriousness of what is at stake will not be an extremely significant variable... in the determination of whether a statute will survive a vagueness attack all other factors being equal, it is probable that a statute imposing penal sanctions will be looked at more severely than one whose operation is of less drastic effect... Winters v. New York, 333 U.S. 507, 515 (1948), contains language to the effect that the standards of certainty in statutes punishing for offenses is (sic) higher than in those depending primarily upon civil sanction for enforcement; and it is indicative that except in Small... no vagueness attack on a non-criminal statute has succeeded."

Vagueness attacks upon state legislation have, in general, been far more successful than vagueness attacks upon federal legislation, which may in part explain U.S. v. Ragen, 314 U.S. 513, (1942), cited on page 12 of Appellee's brief in support of motion. The Supreme Court has considerably more flexible power of control over the enforcement of federal legislation than it does over state legislation and the author of the Void for Vagueness Doctrine, supra. at pp. 82, 83, indicates that this may be an explanation for the apparent conflict between the Ragen case and certain other cases where the Court has held state statutes void for vagueness.

The case of Boyce Motor Lines v. United States, 352 U.S. 337 (1952) cited by Appellee on p. 11 of its motion is easily distinguishable

from the instant case by the fact that the statute there directed that "whoever knowingly violates" the Regulation shall be subject to fine or imprisonment. The standard of reasonable care was not involved. The statute involved was "sustained, in part on the notion that the requirement of guilty knowledge clarified it." Void for Vagueness Doctrine, supra. p. 87, fn 98. The same observation can be made as to the case of United States v. Ragen, 314 U.S. 513 (1942) cited by Appellee on page 12 of its brief. The Ragen case involved a statute which provided in part: "any person who willfully attempts in any manner to evade or defeat any tax... shall...be guilty of a felony..." (Emphasis supplied)

Appellee cites the case of Coplin v. United States, 88 F. 2d 652, (9th Cir. 1937), cert. denied, 301 U.S. 703 (1937) as authority to the effect that the word "misleading" affords the Appellant a practical guide to permissible conduct. The Coplin case cited on page 13 of Appellee's brief involved a violation of the Securities Act of 1933. It is easily distinguishable from the instant case by the fact that the Securities Act does not involve the standard of reasonable care in assessing criminal penalties. Only knowing violations are criminally punishable. In the instant case, the term "misleading" appears in both the mens rea and the negligence clause. As pointed out on page 22 of the jurisdictional statement, the vagueness of the negligence clause is compounded by applying an indeterminate standard of liability to a referentless category of proscribed behavior.

The Coplin case makes it clear that identical words in one context might be constitutionally sufficient and in another context constitutionally deficient. The Appellant has gone into detail in its jurisdictional statement as to the ambiguities involved in the use of the word "misleading" in the statute pertinent in this case. The Coplin case is not persuasive here because of the differences between the statute and standard of liability involved in that case and the statute and standard of liability involved in the instant case. It seems that the words "from the standpoint of investment profitability to a reasonably prudent investor" or similar words are absolutely essential to clarify the category of proscribed behavior when an uncertain word such as "misleading" is used in a criminal statute involving reasonable care as a standard of liability.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

II & III The Question of Whether In All Probability Appellant Did Not Receive A Fair Trial Involves "Special And Important" Reasons for Review By This Court Especially In View Of The Conduct Of Agents Of The State During The Investigative Phase Of This Case.

The arguments made by Appellee under headings II and III of brief in opposition to petition are answered here and hence the headings are combined.

Appellee contends on page 15 of its brief in opposition to petition that Appellant concedes that he did not raise the issue of the fairness of his trial until he made a motion for rehearing before the Wisconsin Supreme Court and cites page 43 of Appellant's jurisdictional statement in support of this statement. A reading of that page clearly shows no such concession. The fact that Appellant argued for dismissal of the information in his original argument before the State Supreme Court certainly does not warrant the conclusion that he was conceding the fairness of the trial. It is an intolerable burden to put upon a defendant on appeal to prove that he had an unfair trial. Appellee evidently claims such a concession by appellant because the appellant at page 25 of its original brief to the State Supreme Court stated that he was not alleging categorically that it was impossible to find twelve persons who might be able to approach Appellant's innocence or guilt with an open mind. The appellant continued in his brief to the State Supreme Court, "The evidence shows that proposition will always be uncertain, and that the uncertainty has been created by the State even though under 14th Amendment due process they have an affirmative duty to systematically insure the reliablility of the guilt determination process in criminal trials. While the State maintains that its agents did not consciously manipulate Appellant or the news media, the Court can draw its own inferences as to motives and objectives of the State from the record before it."

Appellant recognized the impossibility of

the burden of showing unfairness. The Sheppard case clearly acknowledges that identifiable prejudice to the accused need not be proved in order to establish a denial of due process. Lack of due process can be demonstrated where "the totality of circumstances" raises "such a probability that prejudice will result that it is deemed inherently lacking in due process". Sheppard v. Maxwell, 384 U.S. 333 (1966).

The appellee's statement that the appellant concedes that he did not raise the issue of fairness overlooks the following facts. Appellant, prior to trial, at a special hearing on Appellant's motions, raised the question of whether a fair trial could be had in view of the activities of the Attorney General of the State of Wisconsin. Throughout the trial Appellant attempted to introduce evidence of the political motivation behind the charges, and the prejudicial publicity. After trial appellant moved for a new trial as well as for dismissal.

The fact that Appellant sought a dismissal of the charges in the initial hearing before the State Supreme Court certainly does not indicate that the issue of a fair trial was not raised by him. Dismissal was sought by Appellant on the grounds that there was a great likelihood that a fair trial could not be held any place in the state because of the statewide nature of the Attorney General's prejudicial activities, statements, advertising and campaigning. Dismissal is still sought but at the least Appellant is asking for and should receive a new trial. The issue of the fairness of the trial here was part

of the Appellant's defense from the very beginning of these proceedings. Appellant has always contended that a fair trial was most unlikely once the Attorney General had finished his "tar and feather job."

Even if it were conceded that Appellant first raised the issue of the fairness of the trial in the motion for rehearing before the State Supreme Court - a concession not made - the fact that the Sheppard case was decided June 6, 1966 and the original Supreme Court decision was filed June 7, 1966 certainly should be of interest to this Court.

The Sheppard case was not before the Wisconsin Supreme Court at the time of its original decision. It was argued on rehearing, but the State Supreme Court never fully considered that case because of its view that appellant's failure to ask for a change of venue or a continuance barred him from asking for a new trial on appeal. The State Supreme Court stated on rehearing:

> "We consider that appellant, in presenting his appeal, argued only, on this aspect of the case, that because the pretrial publicity instigated by the state's agents might tend to deprive him of a fair trial, the case should be dismissed in order to discipline the state's agents, but chose not to attempt to convince us of the fact nor the probability that such publicity did influence the jury, so as to entitle him to a new trial."

As stated in our jurisdictional statement, it is our contention that the State Supreme Court was unduly technical in not considering a new trial for the Appellant after it had decided not to dismiss the information. There has never really been a determination by the State Supreme Court as to whether or not appellant had a fair trial because that court refused to acknowledge that probability of prejudice is so great in certain instances that the activities of the prosecutor will be deemed inherently lacking in due process. It seems beyond argument that when the full power of the state was brought to bear upon appellant in pretrial statements, activities and publicity as are found here, that prejudice to a great degree certainly resulted to Appellant.

In discussing the Supreme Court cases for the 1965 term, a Harvard Law Review article stated:

> "Ultimately, the case for imposing greater restraints on police and prosecutors may rest on a broader notion -- that public officials should be held to higher standards of conduct than private citizens. Of course, 'state action' is involved whenever a defendant is convicted by a biased jury regardless of the source of prejudice. But since government has immense power and since it sets an example for private citizens, it has a special duty not to 'play an ignoble part' by itself fostering publicity. Moreover, newspapers in practice recognize an obligation to publish major statements issued by public officials; elimination of

this pressure might encourage more responsible treatment of prejudicial information without impairing the press' ability to provide critical commentary when the situation warrants it."

"Even though the foregoing arguments may justify restricting public officials more stringently than newspapers, there can be no justification for imposing the same stringent standards on the defendant and his counsel. . . Also if an indicted defendant may not defend himself in the press or attack police and judicial misdeeds before the trial, he is left faced with a public accusation to which his only reply can be a formal plea of not guilty." The Supreme Court, 1965 term, 80 Harv. L. Rev. 180 (1965) at 185.

Appellant can not improve on the reasoning of the above Law Review article in answering appellee's contention that appellant's public statements bar him from complaining about those of the state's chief prosecutor.

A reading of the press releases of the Attorney General as outlined in Appellant's brief and as found in much greater detail in the scrapbook presented at the hearing on the pretrial motion to dismiss certainly negates the argument by Appellee that the Attorney General's conduct here is less flagrant than in other cases cited by the Appellee. The Attorney General's conduct here, on the contrary, is much more flagrant than that found in any

cases cited by either the appellant or the appellee. See pages 30-35 of appellant's jurisdictional statement. The conduct of other office seekers on the Republican ticket has been mentioned in appellant's jurisdictional statement because the Attorney General could reasonably foresee this result of his vicious unfair public attacks on the appellant.

As pointed out in the jurisdictional statement appellant initially sought sequestration of the jury and later, when it became apparent that there would be great difficulty in obtaining jurors for a long trial if the jury were to be sequestered, appellant, for business reasons, consented to proceed without sequestration. Sequestration of jury is a more effective remedy than a continuance or a change of venue, but not in a case involving a long trial; it may induce exasperation as dangerous to the defendant as publicity. The main defect of sequestration is that it can not cure pretrial publicity.

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury...all practising lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949).

It is the contention of the appellant here that none of the normal remedies of change of venue, continuance, or sequestration were really remedies for him in view of the massive and virulent attacks upon him by the State's chief prosecuting officer and in view of the desperate straits into which previously successful businesses of the appellant were plunged by these attacks.

Appellee in its brief in opposition to petition on page 17 states that it is unfortunate that appellant did not provide this Court with the record of the instructions by the trial court to the jury with respect to the news media so that they can be compared with those of the Sheppard case. We, therefore, set forth here the instructions of the trial court to the jury along with the judge's instructions at the beginning of the trial in the Sheppard case.

The trial court's instructions in this case follow:

> "The jury will be instructed at any adjournment on any date to the effect that you should not read about this case in any newspapers; you should not listen to any radio; you should not look at any television that may have any announcement with reference to it; you should not discuss the case with anyone; you should not discuss the case amongst yourselves until you are instructed and retire to the jury room for deliberations; and to all the jurors, both in the box and in the courtroom, you are instructed--and the Court will repeat this instruction--that if anyone ever attempts during the progress of this trial to discuss this case or the purported facts with you, you will so inform the Court when you return to court, and the Court will then take charge." Trial Record p. 337.

After several repetitions by the trial judge they usually tended to be more cursory.

The judge's admonitions at the beginning of the Sheppard trial follow:

> "I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as the case is concerned. You will feel very much better as the trial proceeds... I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content... At intervals during the trial, the judge simply repeated his 'suggestions' and 'requests' that the jury not expose themselves to comment upon the case." Sheppard v. Maxwell, supra.

The Court stated as to the above instructions, "They were allowed to go their separate ways outside of the court room without adequate directions not to read or listen to anything concerning the case." Sheppard v. Maxwell, supra. The similarities between the admonishments are great.

IV. The Federal Question of Whether Appellant Was Denied A Jury Trial In Violation Of The United States Constitution Was Presented To The Wisconsin Courts And Decided Upon.

The appellant requested certain instructions to the trial court on the question of material fact. As outlined in the jurisdictional statement,

the trial court directed a verdict on the question of whether the cash item was material. The appellant requested a new trial on the grounds that the judge's instructions directing the verdict on a material element of the crime charged was error. On his appeal to the State Supreme Court, the appellant presented this issue to the State Supreme Court and said "the above instruction amounted to a directed verdict as to one element of the crime: the materiality of the statement... to direct a verdict on any material element of a crime is always error. State v. Evjue, 254 Wis, 581, 37 NW (2d) 50 (1949)." Page 76 of appellant's brief in the Wisconsin Supreme Court.

On rehearing in the State Supreme Court, the appellant again argued that the materiality instruction amounted to a directed verdict on this particular element of the crime.

Appellee in its brief in opposition to petition on page 22 quotes from Bryant v. Zimmerman, 278 U.S. 63 (1928) and it is the contention of the appellant that the language quoted by appellee makes it clear that no particular form of words or phrases is essential if the claim of invalidity is brought to the attention of the State court with fair precision and in due time. Appellant contends that by arguing to the State Supreme Court that the instruction amounted to a directed verdict it properly presented the federal constitutional question of denial of a trial by jury. Perhaps it would have been better to cite the various portions of the federal constitution upon which appellant was relying, but there can be no doubt that the issue was presented and argued and decided

upon by the State Supreme Court. Appellee admits on page 22 of its brief that Appellant claimed before the state courts that the instruction deprived him of his right to a jury trial. We think this concession is sufficient to permit this court to act upon the federal constitutional question presented.

CONCLUSION

The unconstitutionality of Section 189.19 (2)(d) clearly presents a substantial federal question. It seems apparent that it is unconstitutionally void for vagueness.

The question of whether in all probability the appellant did not receive a fair trial involves special and important reasons for review, particularly in view of the conduct of state agents during the investigative phase of this case. Abuses of the rights of the criminally accused by the highest legal officer of the state should certainly be scrutinized as closely as abuse of such rights by the "cop on the beat."

The federal question of whether appellant was denied a jury trial was properly before the state courts and should be reviewed by this court.

Appellant respectfully requests that the appellee's motion to dismiss the appeal be denied and that the United States Supreme Court hear this appeal.

Respectfully submitted,

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January 10, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WOODINGTON *v.* WISCONSIN.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 801. Decided February 13, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.